FILED
NOV 16 1903
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 76.

THE CLIPPER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ELI MINING AND LAND COMPANY ET AL.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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THE ELI MINING AND LAND COMPANY ET AL., DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

FIRST.

Counsel say something in their brief about jumpers. The facts shown by the record as to the relative merits of the contending parties are few. It appears that the lode claimants waited patiently from 1877 to 1890, and that during these thirteen years the placer claimants had kept up their pretense of a placer claim, until finally, in November, 1890, the Secretary of the Interior, after full argument, decided that the ground was not placer ground. The public and every one supposed that this was the end of this so-called

placer location. The highest authority in the Land Department had expressly ruled that the ground was not placer. Thereupon the grantors of the plaintiff in error went upon the land quietly and peaceably and located the four lode claims in controversy, spent thousands of dollars in development, and finally demonstrated that they are valuable mines.

This is the position of the lode claimants, and yet they are termed jumpers. So far as the placer claimants are concerned, their position is also set forth in the record. At the bottom of page 55 and the top of page 56 we find in the decision of the Commissioner of the Land Office that a special agent of the Land Department, on December 14, 1882, reported that he had investigated this placer claim and found no improvements located thereon except some made by other parties, which the placer claimants were endavoring to appropriate. We also find that the said agent reported that the land was supposed to contain lodes, and that the placer claim was clearly fraudulent. This badge of fraud, put upon the claim twenty-one years ago, has continued down to the present time. The United States circuit court of appeals for the eighth circuit, in passing upon one of these cases, quoted the opinion of Judge Riner concerning this placer, in which Judge Riner, in a case tried in 1900—in which a mass of testimony was introduced—again held that the placer claim was not located in good faith and had never been maintained as a placer claim in good faith, thus again putting the badge of fraud upon this location.

Eli Mining & Land Company *vs.* Carleton, 108th Fed. Rep., 24.

This is the relative standing and good faith of the litigants before this tribunal. These facts appear from the record.

We would like to make one or two references to the state-

ment of facts, or claimed statement of facts, set forth in the brief for defendant in error. A number of quotations from earlier decisions in the Land Office are given, including the decision of Commissioner Williams with reference to a lode claim called the Zulu. The fact is that all these decisions are referred to in the opinion of the Commissioner of the General Land Office, found in the record of this case, beginning on page 55. The opinion of Commissioner Williams and the result of it is set forth in folio 105, in next to the last paragraph, on page 55. It there appears that the result of this opinion of Commissioner Williams was that the Zulu application for a patent was rejected, but a hearing was ordered to ascertain whether or not the Zulu lode actually existed within the limits of the placer. As the result of this the placer applicants became frightened and filed an amended application excluding all lode claims except the Zulu and Lucy B. Hussey; thereupon all adverse suits, including the Zulu and the Lucy B. Hussey, were dismissed. As to what became of the Zulu and the Lucy B. Hussey does not appear from the record. It would seem, however, from this brief statement that some compromise must have been made with these claimants. These earlier decisions of the Land Office were simply rulings as to whether or not the land was mineral, and of course the Land Department was bound to decide that it was mineral. To show the real effect of these rulings and how they are regarded by the Land Office, we file with this brief and print as an appendix a certified copy of the last decision of the Commissioner of the General Land Office, quotations from which have appeared in our original brief. We think it due to the court to put it in possession of this entire opinion, as it is very elaborate, goes into the questions at issue quite thoroughly, and was fully sustained by Secretary Hitchcock after an elaborate oral argument before Judge Van Devanter and several of his assistants, who were the legal advisers of the

Secretary of the Interior. The opinion of Judge Van Devanter, or rather the Secretary, sustaining this decision is found in Clipper Mining Company *vs.* Eli Mining & Land Company, 29 L. D., 137, quotations from which are contained in our original brief. It will appear from these various proceedings that the original hearings with reference to this placer were simply to determine whether it was mineral ground or not, and that afterwards a hearing was had as to whether it was placer ground, and upon that hearing all the land officers found it was not placer ground.

A good deal was said in the brief of the defendants in error, and something was said in the oral argument, and some questions asked by this court upon the subject of prospecting for lodes within a valid placer location. We do not believe this question is really before the court. The supreme court of Colorado, in its original opinion, did say something about prospecting, but on rehearing it was practically forced to abandon all that had been said in its original opinion and rely upon the abandoned placer application. This position was so untenable that counsel in their oral argument never referred to it and scarcely referred to it in their printed brief. We simply ask the court to read the evidence in the case, found upon pages 38 and 39 in the transcript. It is asserted that all the evidence was not taken up; but the bill of exceptions states that the substance of all the evidence introduced by both sides is in the bill of exceptions. (See page 63 of the Record.) And we insist that it is much better for an appellate court, and enables them to get a clearer view of the points actually in issue, simply to state the substance of the evidence without writing it out at length. In fact, it has been announced by a number of courts that this is the best way to make up a bill of exceptions. We would, upon this point, call attention to the petition for rehearing, found in the transcript, beginning on page 72, and the authorities cited on page 80. We would ask the court to read this pe-

tition and then note the opinions of the supreme court of Colorado upon rehearing. We submit that in its opinion, upon rehearing, the court abandoned all of its reasoning contained in its first opinion, which would include what it said about prospecting, and attempted to adopt the view that the date for the fixing of known lodes in an unpatented placer was not that of location, but of application for a patent.

We wish also to call attention to the Mount Rosa case, which is referred to in the briefs and was mentioned in the oral argument. That was a decision by Mr. Justice Goddard, one of the ablest judges ever upon the supreme bench of Colorado. We quote the following from Judge Goddard's opinion in that case:

"This is an action instituted by the appellee, plaintiff below, against appellant, The Mt. Rosa Mining, Milling and Land Company, defendant below, to quiet his title to two lode mining claims situate within the exterior boundaries of a certain tract of land conveyed to appellant by a Government patent, as placer mining ground.

"Upon the trial it was admitted that the lode claims were formally and regularly located as provided by law, except as to the discovery of mineral therein; that affidavits in lieu of labor, for the years subsequent to their location, were properly filed by the owners, that by proper conveyances the plaintiff became, and was, the owner of whatever title had been acquired by virtue of such locations.

"It was further agreed that the placer owned by the defendant was located some time prior to the location of the lode claims; that the application for a patent was not made until after their location; that the defendant, through proper conveyances, was the owner of the placer.

"The only question of fact that remained in dispute was whether or not a vein or lode was discovered and known to exist in the Handy Andy and Newman claims, within the boundaries of the Mt. Rosa placer at the time appellant applied for patent for such placer, on August 18, 1892."

We submit that it will be seen from this quotation that the lode claims there were located in the placer before the placer had applied for a patent, but that at first no mineral was discovered. This could mean nothing else than that the lodes were not known to exist, and the question was whether they were proved to exist before the placer applied for patent, and the supreme court of Colorado, in the able opinion of Judge Goddard, held that party had the right to make the lode locations, and if the lode was actually discovered before application for patent this was sufficient. We submit that this is the identical question in this case. We would ask the court to compare the use of the word "discovery" by Judge Goddard, where we have quoted it above, with the use of the word in the bill of exceptions in this case, upon page 39. We might say, in passing, that it is stated in the brief of the defendants in error that these lodes were not discovered until 1895. This is not true. The testimony on page 39 shows they were known to some witnesses as far back as 1881, and then the bill of exceptions states that everything required by statute, as to the discovery, location, recording and annual work, had been completely done; that at the time of their location, on November 25, 1890, a lode was known to exist. The word discovery as used there is used in the same sense as used by Judge Goddard in the Mount Rosa case.

We submit, therefore, upon the first point discussed in our original brief, that the law as contended for by us is correct. It is remarkable that not a single authority is cited in the brief of the defendants in error, or was called to the attention of court upon oral argument, that upholds their contention. The only authorities which they cite are those glittering generalities about right to possession and the initiation of title by trespass. No one disputes any of those principles; but possession of a placer claim does not give possession of a lode claim, and the location of a lode within a

placer is not a trespass, because the placer claimant has no title to the lode.

As stated in our original brief, it does not seem possible that this court in its placer decisions, the supreme court of Colorado in the Mount Rosa case, all of the officers of the Land Department, and the Federal judges of Colorado can be wrong on this point, and that the two judges of the supreme court of Colorado in this case are the only ones that are right.

SECOND.

We do not care to add to our original brief upon this point, except to call attention to the case in 29 L. D., 522, where it is held by the Land Department that a townsite applicant cannot adverse a lode claim. The Secretary there reviews the authorities quite fully, and sustains our position in much better language than we could state it. We respectfully refer the court to that additional authority. There can be no difference between the principle of that case and the principle of the case at bar.

THIRD.

We think we have covered this point fully in our original brief, but counsel for defendants in error gave it first place in their brief and expend most of their ammunition upon it. We would like to call attention to their summing up, which is found upon page 19 of their brief. We submit that the ruling of the Land Office was that this was not placer land. The use of the words "as a present fact," upon which both counsel and the Colorado court like to dwell, does not, in our judgment, change the result of this conclusion. Mr. Searl applied for a patent upon his placer. He was met by a protest, upon which a hearing was had to determine, first, the character of the

land; and, second, the status of existing claims and interests. As a result of this hearing, it was found by the register and receiver, who listened to the witnesses, that the improvements required by law had not been put upon the property, and that the land was not sufficiently valuable for placer mining purposes to authorize a placer patent. Thereupon the application for a patent was dismissed. We would like here to call attention to an error in the printing of the opinion of the Commissioner in the record, near the bottom of page 59—fifth line from the bottom—the word "not" is found in the record, when it is very evident it should be omitted, as the Commissioner said that the evidence did indicate the probable existence of mineral in rock in place. This decision was then affirmed by the Commissioner and afterwards by the Secretary. It has been ever afterwards treated and referred to by the Land Department as a ruling that the land had been found to be not valuable for placer purposes. We would, in support of this, call attention to the opinion of the Commissioner, which we file with this brief, and to the opinion of Secretary Hitchcock affirming it. While we concede that the Department can always investigate the character of land belonging to the United States at any time before patent finally issues, yet, when it is once determined land is of a certain character, that finding is conclusive until reversed by the Land Department itself, and it is conclusive up to the time of the decision. Any other rule would result in endless chaos, so far as courts of justice are concerned. There must be an end of litigation in the Land Office as well as in the courts, and where the Land Office has finally disposed of an application and dismissed it from the pale of its jurisdiction, that finding should be just as conclusive upon the courts as though it had entertained the application and granted the patent. For instance, in this case, if Mr. Searl had received a patent when he made his application this court would be bound by the findings of

the Land Office that the ground was placer. When the Land Office refuses the patent, is not its conclusion then equally binding? We believe that this court will be bound to hold that it is.

As already shown, the case is distinguished from Beals *vs.* Cone case, in that there the application was rejected only for some defect in the discovery shaft of the applicant. That was amended upon the second application and the patent allowed.

In conclusion, we would like once more to call attention of the court to the fact that it would seem to be a gross injustice for this court to say that an unpatented placer is more valuable or given more rights than a patented placer, and yet it is conceded that this is the effect of the decision of the supreme court of Colorado.

Such a result will be that many new mining districts will be at the mercy of a few speculators. The moment it is known that a new discovery has been made the country can be covered by placer locations. In Colorado a placer location covers as much territory as sixteen lode claims, and one hundred dollars' worth of work a year will hold the entire placer; that is, sixteen lode claims could be held at an annual expenditure of six dollars for each. The ground would be withdrawn from exploration and purchase although the title was still in the United States. Eight persons, seven of whom are usually only nominal parties, can locate as many placer locations as they please and monopolize an entire district. No one could even be permitted to enter within the limits of the claim. We would also call attention to the fact that stone quarries, saline deposits, and similar tracts may now be located and patented as placer. It will be seen how easy it is to withdraw large tracts in this way. Surely if the doctrine of the supreme court of Colorado stands, we will see, as Colonel Morrison says, the intent of Congress in the disposition of the public mineral lands clearly defeated.

We would also insist that it is unjust to the owners of these four claims to hold that their claims are invalid when, as appears from the 108th Fed. Rep., 24, other claims located in the same placer have gone to patent. In other words, simply because our case happened to be tried in a State court instead of a Federal court is no reason why we should not receive the same measure of justice.

Respectfully submitted.

C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
Attorneys for Plaintiff in Error.

APPENDIX.

4–219.

N. E. C. F. DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON, D. C., *November* 14, 1903. C. A. B.

I, J. H. Fimple, acting Commissioner of the General Land Office, do hereby certify that the annexed copy, pages 1 to 15, inclusive, of decision of this office dated December 20, 1898, in case of The Clipper Mining Co. *v.* A. D. Searl *et al.*, involving the Searl placer and Capital and other lode claims, Leadville, Colorado, land district, is a true and literal exemplification of the record of said decision on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal United States General Land Office.]

J. H. FIMPLE,
Acting Commissioner of the General Land Office.

"N." G. F. P. DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON, D. C., *December* 20, 1898. W. O. C. H. G. P. J. V. W.

Address only the Commissioner of the General Land Office.

THE CLIPPER MINING CO. *v.* A. D. SEARL ET AL. } Capital and Other Lode Claims. M. E. 4347.

Register and Receiver, Leadville, Colorado.

SIRS: August 31, 1893, the Clipper Mining Company made mineral application No. 4359 for the Capital, Congress,

Clipper and Castle Lode claims, mineral survey No. 6965, the claimed portion of which lies wholly within the limits of the Searl placer claim, mineral survey No. 435. Said Searl placer claim was located December 14, 1877; was applied for July 5, 1879, and publication therefor made; was adversed and suits thereon instituted. November 10, 1882, an amended application for said placer claim was filed, reducing the area originally applied for to permit the exclusion of certain lode mining claims.

Said placer application was, however, rejected because of the non-placer character of the land, which action on successive appeals was confirmed by departmental decision of November 13, 1890 (11 L. D., 441). Said Searl placer claimants, however, were among those who adversed the Clipper Mining Company's lode application for the said claims, and instituted suit upon their adverse. The other adverse claims have been concluded without trial. The Clipper Mining Company, ignoring the Searl adverse suit, proceeded to make application to purchase. This application was rejected by the local office because of the pendency of the suit on the placer adverse.

An appeal from such rejection was taken, the lode claimants arguing that under said departmental decision of November 13, 1890, the placer claimants had no rights upon which to base such adverse suit. This contention was not, however, sustained, for by departmental decision of May 13, 1896 (22 L. D., 527), affirming the successive decisions below, it was held that the former decision of the Department in the Searl placer went only to the extent of rejecting the placer application for patent; that it did not assume to declare the placer location void; that it did not affect the placer claimants' possessory rights, and, therefore, that under said adverse proceedings the lode application must await the judgment of the court on the suit instituted, a mere matter of procedure which has been followed.

The judgment of the court in said suit, dated June 8, 1898, is in favor of the placer claimants for the entire area applied for and claimed under the adverse, and under this judgment on August 4, 1898, the local officers allowed the adverse placer claimants to make mineral entry No. 4347 for the "Capital, Clipper, Congress, and Castle Lode mining claims." The papers were duly forwarded to this office, where it has been strongly urged that important interests were dependent

upon the immediate issuance of patent on the entry. The entry, however, has proceeded in the regular order under the rules, due time having been allowed all parties in interest to be heard thereon.

September 8, 1898, The Clipper Mining Company, the defendant in the adverse suit, filed in this office its protest against the issuance of patent on such entry for reasons hereinafter stated. September 19, 1898, said company's resident attorneys filed what purports to be a copy of a writ of error from the supreme court of the State of Colorado to the district court of Lake county, Colorado, which latter court rendered judgment in the case. November 4, 1898, the entrymen's resident attorneys filed an argument and motion, praying for the dismissal of said protest and for the immediate issuance of patent on the entry. December 1 and 10, 1898, the protestant and S. M. Carleton, as the general manager of the Clipper Mining Company and in his own behalf, filed, by the resident attorneys, additional protests and arguments in the case. The office, therefore, has the benefit of able and exhaustive briefs which are supported by a formidable array of authorities bearing upon the points in this case.

It will readily be seen from the foregoing and from the fact that the land involved is situated in North Leadville that careful consideration is required to reach a conclusion in this case which will be in harmony with the mining laws and the regulations thereunder. The case could, however, be disposed of without going into the record or the argument presented, but in view of the importance of the matters presented a complete recital of the record will be made.

This examination, however, will be confined to the case as it stands, and will not include the voluminous record heretofore had in the case and now on file in the office, wherein it is shown that the original application for the land as a townsite entry was rejected because of the mineral character of the land, and wherein the placer application was rejected because of the known lode and non-placer character of the land after a careful investigation by the Land Department. The entry was made under the following provisions of section 2326, U. S. R. S.:

"After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof,

may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess."

The entry papers consist solely of a corrected but still inaccurate copy of the judgment-roll, satisfactory proof of all of entryman's citizenship except F. C. Schroeder, the application to purchase, the receiver's receipt, the register's final certificate, and the local officers' statement that the lode application papers are on file in this office.

There is no survey or certificate of improvements with the entry papers, and if it was intended that the survey of the lode claims would supply this deficiency, such expectations will not be realized. The lode survey does not presume to describe the land covered by the adverse or described in the judgment. It simply describes the lode claims which lie partly outside of the placer limits. If patent were to issue on the entry, a survey in accordance with the description of the judgment would have to be made and an accurate copy of such judgment furnished; also a certificate of improvements would have to be furnished. There is no apparent effort made to conform to the requirements of the statute, that a certificate of improvements and "the description required in other cases" shall be furnished with the judgment-roll. Section 2326, U. S. R. S.

See also Albert F. Marsh, 2 L. D., 706.
Alice Placer, 4 L. D., 314.

The question is, however, whether if the survey were made it should be for lode or for placer claims; in other words, whether entry should have been made under lode or placer laws, or either. In the adverse claim, the placer claimants allege *inter alia* that the lode applicants "have not discovered the top or apex of any vein of quartz or rock in place or any vein or lode bearing gold * * * or other

valuable deposit running lengthwise of their pretended claims or any part thereof."

In its decision in this case the court held:

"The defendants having entered upon a valid subsisting location of a placer mining claim owned by and in the possession of the plaintiffs did not initiate any rights whatever."

The judgment of the court concludes therefore that the plaintiffs are entitled to—

"That portion of the placer claim called the Searl placer claim situate in the California mining district, county of Lake and State of Colorado, bounded and described as follows:"

But here the placer claimants and the court part company. The final certificate of entry describes the claims as lode claims, gives the length of the lode lines, and concludes with a reservation of all rights to the remainder of the placer claims. The courses and the distances given in the judgment-roll are described in the certificate. Such judgment is intended to follow the description of the adverse which gives the exterior lines only of the conflict without any reference to the identity of the lode claims. Neither does said judgment-roll attempt a description of the lode claims. Nowhere in the record is there any claim asserted by the placer owners to lode in said placer. There is absolutely nothing in the record upon which the placer claimants can hang a claim to the lodes which have been entered. If, as alleged in the adverse upon which judgment was rendered, the lode locators had made no discovery, then there could be no lode location, for a lode location without a discovery must fall. But, strange to say, the court in this case is "satisfied that the defendants have discovered a lode claim within the boundaries of the Searl placer, but that the discovery was made subsequent to the location of the placer."

There was only one question before the court, the question of the right of possession of the ground involved, and the court found this to be in the placer claimants, not because they had any right to the lode claims, but upon the new and novel ground that the lode claimants had no right to enter upon the placer location. It is not necessary to the decision in this case to consider the effect of this, the first decision of the courts denying any right to lode locators within the

limits of a mere unapplied-for placer location, a decision at total variance with the practice and rulings of this office and the Land Department. It is evident, however, that if the entry is at all possible under said judgment it must be made for a placer claim only as it cannot be made for lode claims under the clear and unmistakable rulings of the Department in the case of the Aurora Lode *v.* Bulger Hill and Nuggett Gulch Placer, (23 L. D., 95) as follows:

"* * * I do not understand that by the said adverse proceedings the owner of the placer claim asserted any right whatever to the possession of the vein or lode. On the contrary, the complaint filed in the court distinctly sets forth a claim to the premises in question as a placer mine, and makes no claim to any vein or lode that may exist therein. Instead, therefore, of any claim to the possession of the vein or lode being shown by the adverse proceedings, it clearly appears therefrom that the then placer claimant *disclaimed* any such right of possession, by basing his said adverse proceedings wholly and solely upon a placer location or claim.

"* * * The question there determined was simply the right of possession of the placer claims, distinctly as such; nothing more. No claim to the lode was asserted by the adverse claimant, although it appears from the said protest that its existence and its ownership by Bennett, etc., were at the time, well known and generally recognized facts. The complaint filed by the adverse claimant whereon the proceedings in the court were founded, which is not restricted to the premises in controversy here but appears to cover the whole area of the placer locations, avers the right of possession in the plaintiff of the premises described, as *placer claims*. The issue tried by the court, therefore, must necessarily have been simply whether the plaintiff was entited to the possession of the premises as *placer claims*. It could have no wider scope under the pleadings.

"By the judgment of the court there was awarded to the plaintiff 'the possession of the above described placer mining claims.' No question as to the ownership or right of possession of the lode was passed upon. No such issue was raised by the pleadings, and therefore could not have been decided by the court."

Practically this same principle has again been enunciated by the Secretary in his decision dated December 7, 1898, in the case of the Alice Mining Company, wherein it appears

that the lode application was adversed by a placer claimant company which secured judgment for the placer claim and upon which judgment the placer claimant made entry for the lode claims, which entry has been ordered canceled.

The conclusions laid down in the above cases are strikingly applicable to the conditions existing in this case. Under said rulings, by which this office is governed, it must be held that the entry for said lode claims was not warranted by the judgment and was, therefore, erroneously allowed.

It cannot be claimed that this is refusing to follow the judgment of the courts, as directed by the statute, and which the entrymen's counsel quotes as an inexorable rule which this office is bound to follow. The statute provides that patent under the judgment shall issue for the tract the claimant is shown to "rightly possess." Clearly the entrymen have not asked for what they are shown to "rightly possess," even if they possess any rights in the matter, but they have asked for what is clearly shown they do not possess. This is proven by the judgment itself, which found that it was the defendants who had "discovered the lode claim within the boundaries of the Searl placer." But, beyond this, the mere entry of judgment does not compel the Land Department to issue patent thereon, a fact generally recognized and sanctioned by the courts. The claimant must satisfy the Department that the law has been complied with in every particular.

Alice Placer, 4 L. D., 314.
Perego *v.* Dodge, 163 U. S., 160.

There is only one possible way under the U. S. mining laws by which a placer applicant can secure title to known lodes within his placer claim and that is in the manner provided for in section 2333, U. S. R. S., by asserting claim to such lodes in his placer application.

But it is impossible under the proceedings taken in this case to assert any such claim to the lodes entered. They were not claimed in the placer application, either original or as amended, nor in the adverse suit nor in the judgment based thereon. It is extremely difficult, therefore, to determine by what construction of the mining laws such a claim as is here asserted can be made or defended.

The entire proceedings in this present case display a remarkable estimate of the purpose and scope of the mining laws

by the entrymen. Their placer application for patent, made without any claim to known lodes, was rejected because of the non-placer character of the land applied for. They proceed, however, to adverse the lode applications, and secure judgment because of the prior placer location. They now seek under cover of such judgment to secure patent for the lode claims which they denied ever existed. To admit such proceedings would be to place a violent and unwarranted construction on the meaning or the purpose of the mining laws.

The utmost liberality is allowed under said laws to persons seeking title to the public lands, so long as the claims are made in good faith and the land covered thereby is subject to disposition under the form of the laws applicable thereto, but there is no place in either the spirit or the letter of the law for cases of this kind. If there are lode locations in such placers which are not claimed by the placer applicants, it is a perfectly plain proposition that they should be held to be the property of the lode locators. This is the ruling of the Department and the courts, even including the court which decided this case, which, however, fails to distinguish between the two classes of mineral deposits, lode and placer, which are separate and distinct as are agricultural and mineral lands.

However, enough has been stated to show that the entrymen have no right to the lode claims under the judgment. Nor is the office called upon to consider at this time whether an entry can be made under said judgment for the placer claim. This involves the question of the character of the land, a question which is solely within the jurisdiction of the Land Department.

St. Louis Smelting Co. *v.* Kemp, 104 U. S., 636.
Lee *v.* Johnson, 116 U. S., 48.

The case might be closed at this point, but it is here where the protestants present matter calling for consideration and action. The protestants insist that the entire adverse proceedings were invalid, but no consideration need be given this in view of the fact that said departmental decision of May 13, 1896, *supra*, held otherwise and this office has no alternative, even if it felt inclined to hold otherwise. They also allege failure of the placer claimants to perform the annual assessment work. This question also seems to have

been disposed of as the court held, "that the Searl placer was duly located, as required by the law, in 1877, and that the annual labor has been performed, as required by law, to the present time."

They also refer to the existence of suit in court between the Searl placer claimants and the Seal placer claimants, which latter claim covers the ground included in the Searl placer claim. But these are not matters for the consideration of this office in this case, and are not in any way involved and could not be affected by any decision made.

The only allegation that is worthy of any consideration whatever is that which alleges that a writ of error has issued in this case, and the question is whether action by the Land Department should be suspended until final action by the courts on said writ of error. The judgment of the court is dated June 8, 1898. August 3, 1898, the clerk of the court certified that no appeal had been filed and that no costs had been paid before the beginning of the August term, 1898, which was necessary in order to obtain a new trial. The copy of the writ of error is not properly certified. It is contended, however, by the protestants that the same is now under consideration by the courts. It is, however, considered sufficient for the purpose of determining whether proceedings in this case should be stayed, as required by section 2326, U. S. R. S.

The writ of error, dated September 15, 1898, is in the name of the chief justice of the State supreme court directing the clerk of the trial court to certify up the record in the case so that the judges of the supreme court may have it before them on October 15, 1898. The only record of any action in the matter is the statements by the protestants' attorneys that action thereon is under consideration, and it is upon this that the protestants ask a stay of proceedings.

The entrymen's resident counsel ingeniously argues that apart from the fact that the writ of error lacks the necessary certification, it is not sufficient to warrant the stay of proceedings asked for; that a writ of error is not a continuation of the old suit, but a new suit; that it cannot affect the intervening rights; that execution has issued upon the judgment of the court in this case; that the entrymen have not been advised of the writ of error or of any action or proceeding thereunder, and that even if allowed, said writ need not delay the issuance of patent under the judgment, for if

the judgment was reversed the patentee could be declared trustee for the rightful owner by supplemental proceedings in court. The arguments for the protestants are equally strong and instructive, but all are wholly inapplicable to this case, and many of them could be more properly and profitably submitted to the courts. The fact remains that if the writ of error actually issued in this case, all proceedings before the Land Department must be stayed unless it is apparent that action by the Land Department would not be affected by the final decision of the court.

It is true that the Land Department is not required to await the expiration of the time allowed for appeal or writ of error, but where it has notice of such filing it must consider the same. It is also true that a writ of error, technically speaking, is in the nature of a new suit. It is generally considered, however, as the continuation of the same cause of action, which entrymen's counsel practically admits when he states that if the lower court were reversed it would not affect the patent, a proposition that cannot be entertained, as upon its face it admits the possibility of the issuance of an erroneous patent. Further, a writ of error is to the common law what appeal is to the statutory law, and in the State of Colorado both forms are equally allowed by section 401 of the Code of Civil Procedure, three years being the limit within which to bring said writ of error; section 402, *supra*. It is claimed, however, that execution has issued on such judgment, and that there is no evidence that a *supersedeas* has issued on said writ, and the entrymen allege that none will issue because it is claimed that the writ was sued out for the sole purpose of delaying final action on the entry. This claim is denied, however, by the protestants, but in any event the *bona fides* of the application for the writ of error is a matter for the courts to determine and is not a question for the Land Department to either consider or to pass upon; and so far as the entryman's claim is concerned, there is nothing to show that this case should prove any exception to the general rule.

There is, however, a question whether it will be necessary for the Land Department to await action by the courts on the case.

It is established to the satisfaction of this office by the foregoing proceedings that the suit instituted on the placer adverse has not been finally determined and that so far as

the records show is still pending in court. It therefore follows that the entry allowed before final disposition of adverse proceedings is in contravention of the statute and is therefore invalid.

It is held that an entry so allowed must be canceled.

Mayer *v.* Hyman, 7 L. D., 83.
Brown *v.* Bond, 11 L. D., 150.

See also
Richmond Ming. Co. *v.* Rose, 114 U. S., 576.

Therefore, and for the reasons hereinbefore stated, this entry is hereby held for cancellation.

Very respectfully, BINGER HERMANN,
Commissioner.

W. E. M.